

1 **COMMENT SET 5: ALLIANCE OF COMMUNITIES FOR SUSTAINABLE FISHERIES**

April 25, 2005

**By email, facsimile, and Federal Express**

Mr. Stephen L. Jenkins, Project Officer  
California State Lands Commission  
100 Howe Street, Suite 100-South  
Sacramento, CA 95825-8202

Ms. Deidre Hall, Permit Coordinator  
Monterey Bay National Marine Sanctuary  
299 Foam Street  
Monterey, CA 93940

RE: Draft Environmental Impact Report/Environmental Impact Statement;  
Monterey Accelerated Research System (MARS) Cabled Observatory; SCH No.  
200401511388; CSLC EIR No. 731; CSLC File #'s: W25980; W30156

Dear Mr. Jenkins and Ms. Hall:

On behalf of the Alliance of Communities for Sustainable Fisheries (the "Alliance" or "ACSF"), we are providing the following comments on the Draft Environmental Impact Report/Environmental Impact Statement ("DEIS") regarding the proposal to issue the necessary state and federal permits to the Monterey Bay Aquarium Research Institute ("MBARI")<sup>1</sup> to lay and operate a cable in Monterey Bay. We have been advised by Michelle Brown of the State Lands Commission, that the date for filing these comments has been clarified as the close of business, Tuesday, April 26, 2005, because of the mistake in the closing date set forth in the DEIS/EIR.

The goal of the Alliance is to support the fishing communities of the Central California Coast. Our comments are submitted on behalf of interested fishing groups whose members traditionally and regularly harvest fishery resources in Monterey Bay, including in the area that

---

<sup>1</sup> We understand that MBARI, a private research entity, is serving either as a contractor or grantee of the Federal government for purposes of this project. Also involved are the University of Washington, the Jet Propulsion Laboratory, and the Woods Hole Oceanographic Foundation. MBARI is affiliated with the Monterey Aquarium, a private institution that provides entertainment to the general public for an entrance fee, sells commercial products, and promotes certain environmental policies that are particular to that organization and that may not be consistent with policies set forth in State and Federal law and policy.

would be impacted by the proposed laying of an underwater cable as part of the MARS project. In fact, MBARI is a very recent addition to Monterey Bay, compared to the long history of utilizing the resources of this region by those who have depended on the sea for their way of life.

ACSF's interests are not simply limited to harvesting resources. The organization and its constituents have an abiding interest in preserving and protecting the Monterey Bay marine environment generally. A healthy marine environment supports strong fish stocks. Consequently, ACSF is vitally interested in making sure that the entire ecosystem remains healthy, including essential fish habitat, endangered and threatened species, marine mammal populations, water quality, and the water column and seafloor. Ecosystem management requires protection of all the unique environmental features of the Bay.

### ***Project Description***

The MARS project is publicly funded, by the National Science Foundation, as part of the Federal budget. What is proposed is the construction and operation of a lengthy (31.7 mile) submarine cable network that would impact the water and seabed on lands owned by the State of California and United States in an area designated by Congress and the National Oceanic and Atmospheric Administration ("NOAA") as so unique as to merit being named a marine sanctuary under the National Marine Sanctuaries Act, 16 U.S.C. § 1431 et seq. The project will consist of a set of underwater cables and "docking" stations, carrying power and high-speed data links in support of various oceanographic devices, which will include remote sensors, each of which could stretch as far as an additional 2.5 miles from the end of the cable. The power that will run the system is estimated at 10 kilowatts, or enough to "supply a small neighborhood."

It appears that the actual installation of the cable will be done not by an American company but by a French company, Alcatel, using a foreign-flag vessel, the M/V *Ile de Re*.<sup>2</sup> It appears that a sizeable trench, at least one foot wide (or probably more) and three feet deep, will be dug for an undisclosed distance. Based on the description in the DEIS (p. ES-4), it is not clear just how much of the cable will actually be buried but it is stated that about 5.6 miles, located on the seafloor edge of Bay that begins a steep vertical drop, will not be buried (DEIS; Figures 4.4-6 and 4.4-7). In addition, another portion inland of the unburied portion, of unknown length, would be "partially" buried. The cable would connect to a pipe located about .89 miles from shore, which ties it to the shoreside facilities on MBARI property. That portion of the system would be constructed using the same directional drilling techniques used by the offshore oil and gas industry.

5-1

ACSF is deeply concerned because the area where the cable will not be buried, or only partially buried, cuts across one of the most important fishing areas within and on the shelf of the Bay, an area critical to fishing and where bottom-trawling equipment is essential to success (DEIS; Figures 4.2-1 and 4.2-2). For this and other reasons, it would appear, the DEIS states that the only area of controversy the Applicant sees is the conflicts with local fishing activity that

5-2

<sup>2</sup> We presume that the use of this vessel will not violate U.S. cabotage laws with respect to coastwise trade, but do not know for sure. It is unfortunate, however, that this Federal project will not be using an American company and an American vessel for the work on the cable.

may catch and injure the cable. DEIS; p. ES-7. Contrary to the poorly documented statements in the DEIS, there is a significant risk that trawl doors from a working vessel will snag on the exposed cable, perhaps even on the area above the buried cable if the surface is not smooth. There is also a risk that deeper working trawl gear will snag on the terminal "nodes," notwithstanding that this part of the cable will be covered by a supposedly trawl-resistant cover. Other types of gear may be affected by the unburied and exposed part of the cable and its terminal "nodes."

5-2,  
cont.

The Applicant has been in discussions with local fishermen's organizations in an attempt to put a Fisherman's Agreement in place that would specify the terms, procedures, and rules for providing compensation to any fishermen whose gear is damaged or lost if snagged on the MARS cable or science nodes. At the time of the filing of these comments on the Draft EIR/EIS, an acceptable Fisherman's Agreement has not yet been negotiated between the Applicant and the fishermen's organizations.

5-3

As of the writing of these comments, ACSF can confirm that no such agreement is in place, although a proposed agreement was presented to us by attorneys for the Applicant MBARI at approximately 3:30 p.m. on Thursday, April 21, 2005. This was the first time that MBARI put any kind of proposal in any real detail in writing.<sup>3</sup> ACSF remains hopeful that a satisfactory agreement can be reached so that the conflict created by the proposed cable with traditional fishing activity will be addressed and resolved, to the extent possible. However, as of the filing of these comments, analysis and approval by our constituent groups is still ongoing. We are not confident that an arrangement can be worked out, given what we believe is a conflict of interest on the part of MBARI, as will be explained below.

#### ***Legal Status of the Submerged Cable***

It is our understanding that MBARI is engaged in a project funded by the Federal government. While the purpose of the cable is explained (DEIS, at ES-1), the DEIS does not discuss at all the legal status of the cable. For example, is the cable owned by the Federal government or by the private institution MBARI? If it is owned by the Federal government, is any conflict with other legitimate uses of this part of the marine environment governed by laws applicable to activities of the Federal government, including sovereign immunity? A related question is whether MBARI would have any legal standing to seek damages should a fishing vessel inadvertently injure the cable.<sup>4</sup> Could the fishing vessel seek damages against MBARI if the cable is either not properly buried or improperly marked? Will the cable be shown on navigation charts or made the subject of notices to mariners issued by the United States Coast Guard? Unfortunately, none of these issues are addressed in any meaningful manner in the DEIS, notwithstanding the concession that conflicts with fishermen are very possible. Quite

5-4

<sup>3</sup> MBARI's attorneys have made the content of their letter subject to the protections of California law with respect to settlement negotiations, so ACSF will not disclose the terms of MBARI's proposal.

<sup>4</sup> See *American Telephone & Telegraph Company v. M/V CAPE FEAR*, 967 F.2d 864 (3<sup>rd</sup> Cir. 1992) (Submarine Cable Act does not give private right of action to cable owners to recover for negligence against a fishing vessel).

clearly, MBARI is seeking to create an obstruction in areas known to be subject to fishing activity.

In general, it does not appear that construction and operation of submarine cables, as a matter of State and Federal policy, are favored activities in this particular coastal area. In fact, the regulations in force for the Monterey Bay National Marine Sanctuary bar such activities because they constitute “[d]rilling into, dredging or otherwise altering the seabed of the Sanctuary,” except pursuant to certain exceptions, none of which are relevant here. It does not matter if the cable is being installed for research or commercial purposes; submarine cables in Monterey Bay are barred by Federal regulation.<sup>5</sup> 15 U.S.C. § 922.132(a)(4). Moreover, other far less intrusive remote sensing techniques are available to conduct the research contemplated here. However, use of such alternative non-intrusive research techniques, and avoidance of all the environmental impact, is not discussed to any meaningful degree in the DEIS.

5-5

5-6

One environmental group has said that “[m]any of the activities inherent to submarine cable installation, operation, repair, and removal are generally incompatible with the National Marine Sanctuary Program’s statutory objective of resource protection.” Correspondence from Kaitilin Gaffney, Ecosystem Program, Center for Marine Conservation (now called the Ocean Conservancy), to Matt Brookhart, National Marine Sanctuary Program, NOAA (March 21, 2001). ACSF agrees with that statement.

It is ACSF’s position that the MARS cable cannot be allowed under the National Marine Sanctuary Act without the issuance of a “special use permit.” 16 U.S.C. § 1441. No such permit can be issued for more than five years, unless renewed. In addition, it is mandatory that the permittee purchase and maintain comprehensive general liability insurance, or post an equivalent bond, against claims arising out of activities conducted under the permit and to hold the United States harmless against such claims, among other requirements. 6 U.S.C. § 1441 (c)(4). Without such a permit, the MARS project will violate Federal law. Fees may also be required, although a waiver of fees may be available for research activities.<sup>6</sup> However, all “research” is not the same. Some methods of gathering scientific data are far less intrusive than others. For example, using explosives to gather geophysical data is more intrusive than other means. Here, the laying of the MARS cable, using oil and gas drilling methods and commercial cable laying equipment, is very intrusive, no different in kind from any other submarine cable. Congress intended that such activity apply for and obtain a special use permit.

5-7

#### ***Legal and Policy Status of Fishing in Monterey Bay***

It is important to keep in mind that fishing activity, pursuant to applicable Federal and State law and policy, is a favored activity in Monterey Bay, and per se compatible with the

<sup>5</sup> The only likely exception might be for national security purposes. However, the MARS cable appears to have no national security use.

<sup>6</sup> See 65 Fed.Reg. 51,264 (Aug. 23, 2000) (Installing and Maintaining Commercial Submarine Cables in National Marine Sanctuaries); 66 Fed.Reg. 43,135 (Aug. 17, 2001) (Fair Market Value Analysis for a Submarine Cable Permit in National Marine Sanctuaries).

purposes of the National Marine Sanctuary established in the area.<sup>7</sup> 16 U.S.C. §§ 1433(b)(1)(C) and 1434(a)(5). Fishing activities do not require the issuance of a special use permit to be conducted in the Sanctuary. Moreover, the California Coastal Act (Pub.Res.C. §§ 3001.5 and 30001.5) states that the basic goals of the State for the coastal zone include, among other things, maintaining access in the coastal zone and assuring a priority for coastal-dependent and coastal-related development over other development on the coast. See also, Pub. Res. C. § 30230 (maintenance of marine resources) and § 30234.5 (the economic, commercial, and recreational importance of fishing activities shall be recognized and protected).

5-8

For ACSF, supporting the fishing communities of the Central California coast while preserving and managing our fishery and other marine resources are our primary goals. These goals are established elements of Federal and California State coastal law, as well. A recent ruling by Third District California Court of Appeal confirmed, again, that the public's interest in fishing is firmly protected by the public trust doctrine in California. *California Earth Corps v. Calif. State Lands Commission*, 5 C.D.O.S. 3404 (April 25, 2005). The State holds the tidelands and submerged lands within state boundaries (including Monterey Bay) "in trust for public purposes, which have traditionally been delineated in terms of navigation, commerce, and fisheries." *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 482.

NOAA's National Marine Sanctuary Program has also issued policy statements with regard to possible conflicts between submarine cables and the fishing industry that are instructive here. In discussing the issues raised by submarine cables, NOAA made the following observation in a 2000 Notice in the Federal Register:

Recognize the fishing industry's role as a distinct, critical and interested party in submarine cable issues. [NOAA would accomplish this by strongly encouraging the cable industry to initiate negotiations and develop agreements with marine and coastal resource user groups before their applications for permits and licenses are deemed complete for public review...]<sup>8</sup>

5-9

These observations apply with equal force to any submarine cable project because each one, whether for research or "commercial" purposes, creates the same kind of environmental impacts and possible conflicts with the fishing industry.

Commercial fishing is one of the most highly regulated activities in the United States. On the West Coast, the regulations adopted pursuant to the Magnuson-Stevens Fishery Conservation and Management Act strictly control fishing in the federal waters of the Sanctuary,<sup>9</sup> as do comparable regulations issued and enforced by the State. Regulations for Pacific groundfish are

<sup>7</sup> In contrast, Federal regulations for the Sanctuary currently prohibit the laying of any submarine cable system. 15 C.F.R. § 922.132(a)(4).

<sup>8</sup> In this case, no such agreement was in place with the fishing industry before issuing the MARS proposal for public comment.

<sup>9</sup> Fishery management regulations issued by NOAA-Fisheries govern fishing in the Sanctuary. Congress has stated that "special use permits" are not required to engage in fishing in a Marine Sanctuary. 16 U.S.C. § 1441(g).

particularly strict and have severely limited harvest opportunities coast-wide. The fishing that is now allowed has been fully authorized by current fishery management regulations. Over time, it is expected that stocks will increase and, with that increase, fishing will also increase. Thus, it is reasonable to expect that fishing conflicts will increase over the life of the MARS Project, e.g. 26 years.

5-10

### *Inevitable Conflicts*

Conflicts between submarine cables and the fishing industry are well documented. In fact, Tracey Lynne Holman, a Master of Marine Studies student at the University of Washington, wrote a thesis on the subject in 2000. The paper has been published on the World Wide Web with a cover that stated: Contribution to the NEPTUNE PROJECT; [www.neptune.washington.edu](http://www.neptune.washington.edu). Ms. Holman studied the conflicts between the submarine cable and fishing industries in Oregon and suggested an approach for resolving them. The clear implication is that the NEPTUNE Project, of which the MARS Project is a prototype apparently, can learn from these experiences in implementing its planned submarine cable program and use them in addressing similar conflicts in the MARS and NEPTUNE projects. However, this paper was not even referenced in the DEIS and, to date, MBARI has not addressed the fishing conflict issue in an appropriate and successful manner.

5-11

The DEIS at various points (e.g., Section 4.2) confirms that these conflicts in fact exist, but the analysis of the magnitude and scope of this conflict is shallow and rudimentary, and ignores easily available sources of contrary information.<sup>10</sup> Moreover, nothing concrete is suggested in mitigation to avoid or deal with these conflicts. It is also clear from the discussion in the DEIS that the authors did not directly contact those fishermen who would be directly affected by the impacts. Indeed, as if working from a distance using only general tables and charts developed by regulatory agencies, the DEIS tries to paint a picture of de minimus impact. The text at page 4.2-15 suggests that a snag from bottom fishing gear might occur once in 26 years, giving the impression that any such snag in this setting is extremely unlikely. But the Holman thesis quotes an AT&T source that “[a]t least twice a month, somewhere in the world a fisherman snags a cable with fishing gear.” Holman Thesis at 6.

5-12

But the most glaring omission in the DEIS is the failure to mention MBARI's own research on marine cables and fishing impacts: Irene Kogan, et al., Environmental Impact of a Submarine Cable: Case Study of the ATOC/Pioneer Seamount Cable, Monterey Bay Aquarium Research Institute and Monterey Bay National Marine Sanctuary, November 2003. A summary write up of this research project can be found at [www.mbari.org/education/earth/2004/ATOC](http://www.mbari.org/education/earth/2004/ATOC). This research report was to examine the environmental impacts of the ATOC/Pioneer Seamount cable located in the Sanctuary off Half Moon Bay, California. This cable was installed in 1995, about 10 years ago, for performing acoustic tomography. Contrary to the rosy observations in the DEIS, the following statement is found in the research write up:

5-13

Fishing activity is the main cause of submarine cable breaks worldwide as

<sup>10</sup> This part of the DEIS reads as an advocacy piece, written to put the Applicant's proposal in an overly positive light.